UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	:	
- against -	:	**Civil Action No. 05-CV-3212 (ILG)(VVP)**
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*, Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANTS MANAGEMENT-ILA MANAGED HEALTH CARE TRUST FUND AND ITS BOARD OF TRUSTEES IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Dated: New York, New York
February 11, 2008

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INTRODUCTION

In the face of this Court's prior decision dismissing the Government's First Amended Complaint, *inter alia*, for failing to plead a legally cognizable association-in-fact enterprise under the RICO[1] statute, *see United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422 (E.D.N.Y. Nov. 1, 2007) (hereinafter "*ILA-I*"), the Government has filed a Second Amended Complaint that essentially ignores this Court's holding concerning the infirmity of an enterprise that includes as nominal defendants victims of the alleged racketeering acts, such as the Management-ILA Managed Health Care Trust Fund and its Board of Trustees (collectively "MILA"). Sixty thousand MILA beneficiaries – active and retired workers and their dependents in the longshore industry on the eastern seaboard from Maine to Texas – are being held hostage in a civil RICO action in which they do not belong. MILA is the victim, not the perpetrator, of the alleged racketeering acts the Government seeks to remedy. There is no set of facts that is alleged in the Second Amended Complaint or that could be alleged by the Government to establish that MILA is a part of a RICO enterprise that would warrant its inclusion in this case as a nominal defendant. MILA and its Board of Trustees should be dismissed with prejudice.

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[1] Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.A. §§ 1961-1968 (West 2000 & Supp. 2007).

ILA-I

In its First Amended Complaint, the Government alleged the existence of an extremely broad association-in-fact "Waterfront Enterprise" that included MILA and other victims of the racketeering acts alleged by the Government. *See* 1st Am. Compl. at ¶ 67. In *ILA-I*, this Court concluded that the Government failed to plead a legally cognizable association-in-fact enterprise under the RICO statute. *See* 518 F. Supp. 2d at 475-78. This Court ruled that in light of the Government's admission that the common purpose of the Government's putative association-in-fact RICO enterprise is not attributed to MILA and the other nominal defendants, those entities cannot be constituent members of the RICO enterprise in this case. *See id.* at 477. In this Court's view, what the Government is really alleging in this case is an enterprise comprised of the Gambino and Genovese families, certain members and associates of those families, and a handful of co-conspirators placed in key positions in the ILA and associated labor unions. *See id.* at 477.[2]

[2] During oral argument on defendants' motions to dismiss the First Amended Complaint, the Government confirmed the accuracy of this Court's identification of the proper enterprise in this case:

MR. HAYES: . . . We are saying that there is an informal structure that derives from the shared control, going back to the 1950s - - I recognize that that's something that no one wants to hear about, but it is - - but there has been a problem here for fifty years and that shared control has been extremely durable and it is the Genovese Family and the Gambino Family, their members and their associates, that they have placed in ILA, historically to this day, that they have placed as trustees of the welfare funds and the other funds historically, and as alleged in this complaint, and that have had involvement in every single one of the components of this enterprise.

The problem faced by the Government with this more limited enterprise is that it removes MILA and other institutional defendants from the RICO enterprise and limits the extent of the equitable relief that the Government might pursue. Certainly, without the institutional defendants in the case the relief of court-appointed monitors is not available to the Government. This Court, however, did not consider it the Court's obligation to give the Government whatever relief it seeks. The Court said so in no uncertain terms:

> While limiting the alleged enterprise to that relatively narrow group might create potentially insurmountable obstacles to the Government's efforts to impose equitable relief on some of the nominal defendants in this action, this Court will not abet the Government's effort to stretch the concept of a racketeering enterprise beyond all recognition in order to bring various otherwise disinterested parties within its scope, even for the worthwhile purpose of combating the influence of organized crime on the Waterfront.

See id. at 477. This Court expressed doubt that the Government can allege a cognizable RICO enterprise that includes MILA and other institutional defendants but granted the Government leave to try, if it saw fit. *See id.* at 483.

The Government has now brought forth a Second Amended Complaint that proves that this Court's skepticism was well founded. The Second Amended Complaint alleges the existence of virtually the same Waterfront Enterprise this Court has already rejected. The Government just cannot bring itself to comply with this Court's decision concerning the proper composition of the RICO enterprise in this case.

See Tr. 109-10, *ILA - I*, Oral Argument on Mot. To Dismiss (E.D.N.Y. July 31, 2007).

ARGUMENT

THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST MILA.

There are nine paragraphs devoted to the Waterfront Enterprise in the Second Amended Complaint, six more than in the First Amended Complaint. *Compare* 2d Am. Compl. ¶¶ 72-80 *with* 1st Am. Compl. ¶¶ 67-69. The Government tries to supply what was lacking in the pleading this Court found defective. The additional verbiage, however, does not alter the essence of the Waterfront Enterprise. It remains virtually the same in both pleadings. The Waterfront Enterprise in the Second Amended Complaint contains the same legal infirmities that this Court found in its predecessor.

The Second Amended Complaint Contains Essentially The Same Waterfront Enterprise As The First Amended Complaint.

The Waterfront Enterprise addressed in *ILA-I* was defined by the Government as follows:

> At all times relevant hereto, the ILA and certain of its subordinate components, namely, the Atlantic Coast District, the South Atlantic & Gulf Coast District, Locals 1, 824, 1235, 1588, 1804-1, 1814, 1922, 1922-1, and 2062; certain current and former ILA officials; certain welfare benefit and pension benefit funds managed for the benefit of ILA members, namely, MILA, the METRO-ILA Funds, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; certain businesses operating on or about the Waterfront; an "employer association" operating on or about the Waterfront, namely, METRO; certain members and associates of the Genovese and Gambino crime families; and certain businesses operating in the Port of Miami; constituted an enterprise, that is, a group of individuals and entities associated in fact (hereinafter, the "Waterfront Enterprise" or "Enterprise"), as defined in 18 U.S.C. §1961(4).

1st Am. Compl. ¶ 67.

The association-in-fact Waterfront Enterprise the Government proposed in *ILA-I* consisted of six classes of entities: unions, union officials, employee benefit funds, an employer association, waterfront businesses in the Ports of New York and Miami, and members and associates of the Gambino and Genovese crime families. Five of these classes remain in the Waterfront Enterprise postulated in the Second Amended Complaint:

> At all times relevant hereto, the ILA and ILA Locals 1, 1804-1, 1814, 1922, 1922-1, and 2062; current ILA Executive Officers JOHN BOWERS, ROBERT E. GLEASON and HAROLD J. DAGGETT; former ILA Officers Albert Cernadas, ARTHUR COFFEY and Frank "Red" Scollo; MILA, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; METRO and the METRO-ILA Funds; members and associates of the Genovese and Gambino crime families, particularly ANTHONY "SONNY" CICCONE, JEROME BRANCATO, JAMES CASHIN, and the Conspirators Not Named as Defendants as described in paragraphs 41 through 50, namely, George Barone, Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti, Andrew Gigante, Vincent Gigante, Alan Longo, Ernest Muscarella, Michael Ragusa, Lawrence Ricci, Charles Tuzzo, Peter Gotti, Primo Cassarino, Vincent Nasso and Louis Valentino; constituted an enterprise, that is, a group of individuals and entities associated in fact (hereinafter, the "Waterfront Enterprise" or "Enterprise"), as defined in 18 U.S.C. §1961(4).

2d Am. Compl. ¶ 72.

The only differences between the Waterfront Enterprise in the Second Amended Complaint and its predecessor are the expunging of the waterfront-business class,[3] the removal of the ILA's two districts and several locals from the union class, the identification of the six individuals constituting the union-official class, and the identification of specific individuals in the crime-family class. These minor revisions do not alter the fact that the Waterfront Enterprise in the Second

[3] The deletion of this class of unnamed businesses does not remove all waterfront employers from the mix because the Government continues to include an employer association in its putative enterprise.

Amended Complaint is fundamentally the same as the Waterfront Enterprise in the First Amended Complaint. It is identical to its predecessor in the very element this Court found to be legally deficient in *ILA-I* – the inclusion of MILA and other employee benefit funds.

MILA Does Not Share The Alleged Common Purpose Of The Waterfront Enterprise.

In *ILA-I* the Court found that the Government failed to plead a valid association-in-fact enterprise because it failed to allege any common purpose uniting the enterprise. *See* 518 F. Supp. 2d at 476. The Government admitted that the purpose it alleged in the First Amended Complaint was the common purpose of the Racketeering Defendants, not the common purpose of the Waterfront Enterprise. *See id.* at 477.[4] The Government tries to cure this deficiency in the Second Amended Complaint by alleging this definition of the "Purpose of the Enterprise":

> The purpose of the Enterprise has been to obtain money or other property on the Waterfront and the Port of Miami through extortion or fraud, specifically: (a) ILA union positions, wages, and accompanying employee benefits, from the membership of the ILA; (b) the rights of the ILA membership to democratic participation in union affairs; (c) the rights of the ILA membership to the honest services of the ILA's officers, agents, delegates, employees and representatives; (d) money and economic benefits in benefit plan transactions from ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries; (e) the rights of ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries to the honest services of benefit plan trustees and fiduciaries; and (f) money from businesses.

2d Am. Compl. ¶ 73.

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[4] The First Amended Complaint defined that purpose as follows: "The Defendants' common purpose was to exercise corrupt control and influence over labor unions and businesses operating on the Waterfront, the Port of Miami and elsewhere in order to enrich themselves and their associates." *See* 1st Am. Compl. ¶ 68.

The problem with the Second Amended Complaint is that it does not allege facts sufficient to include MILA in the putative association-in-fact Waterfront Enterprise. The definition of the purpose of the Waterfront Enterprise alleged in the Second Amended Complaint purports to be the common purpose of the Waterfront Enterprise itself, not of its alleged members. But for an association-in-fact enterprise to exist its component members "must *share* a common purpose . . . and work together to achieve such purpose[]." *See First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004) (emphasis added) (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995)). There is no allegation in the Second Amended Complaint that MILA shared the common purpose alleged in that pleading, nor can there be because the Government in open court has already admitted that MILA does not:

> MR. HAYES: Your Honor, the United States tried to take great pains . . . in distinguishing between the ILA and the Metro funds and MILA and people such as Mr. Daggett and Mr. Bowers and Mr. Gleason . . . .
>
> THE COURT: So when in paragraph 68 it provides, the defendants' common purpose, that does not include the nominal defendants?
>
> MR. HAYES: That is correct, Your Honor.
>
> * * *
>
> THE COURT: You are not alleging that MILA or Metro have been exercising corrupt control over the businesses on the waterfront, are you?
>
> MR. HAYES: No, Your Honor. No. . . .

Tr. 102, 110, *ILA-I*, Oral Argument on Mot. To Dismiss (E.D.N.Y. July 31, 2007).[5]

That the Waterfront Enterprise had a common purpose is certainly an element of an association-in-fact enterprise, but it does not enable the Government to include as defendants, nominal or otherwise, entities, such as MILA, that the Government knows do not share that purpose and are not, therefore, constituent members of the association-in-fact Waterfront Enterprise.

The notion that MILA could conceivably embrace the common purpose of the Waterfront Enterprise defies credulity. MILA could hardly have as its purpose an intent to obtain through extortion and fraud money or other property, specifically union positions, the rights of ILA members, the rights of ILA-sponsored pension and welfare benefit funds and their participants and beneficiaries, money and economic benefits in benefit plan transactions from ILA-sponsored pension and welfare benefit funds, and money from businesses. *See* 2d Am. Compl. ¶ 73. None of these benefits and rights is alleged by the Government to have been obtained by MILA. There are no allegations that MILA committed or benefitted from any of the alleged wrongful acts.

MILA is a multiport welfare plan in the East and Gulf Coast longshore industry. Its sole purpose is to provide healthcare benefits nationwide to active and retired dockworkers and their dependents. MILA's entanglement in this case stems from its transactions with two service providers. The Government alleges that MILA was induced through extortion and fraud to contract with these service providers. *See* 2d Am. Compl. ¶¶ 138-223. In other words, MILA was the victim of the Waterfront Enterprise's racketeering activities. MILA could not have shared the unlawful purpose of the Waterfront Enterprise because MILA was its victim, not one of its members. *See*

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[5] A statement of fact made by an attorney during oral argument constitutes a judicial admission that is binding on the attorney's client. *See General Ins. Co. v. Mezzacappa Bros., Inc.*, No. 01 cv 7394 (FB), 2003 WL 22244964, at *5 (E.D.N.Y. Oct. 1, 2003) (citing *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981)), *aff'd*, 110 Fed. Appx. 183, 2004 WL 2245203 (2d Cir. Oct. 5, 2004).

Crab House of Douglaston, Inc. v. Newsday, Inc., 418 F. Supp. 2d 193, 204 (E.D.N.Y. 2006). It is absurd to suggest that MILA which is not alleged to have engaged in any wrongdoing would subscribe to a purpose that would involve its own victimization.

The Alleged Membership In The Waterfront Enterprise Of A Few MILA Trustees Does Not Cause MILA Itself To Become A Member.

The Second Circuit has also instructed that the "hierarchy, organization, and activities" of an association-in-fact must be examined to determine whether "its members functioned as a unit." *United States v. Coonan*, 938 F.2d 1553, 1560-61 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992). A RICO complaint is defective if it fails to "specify how these members [of the putative association–in-fact enterprise] joined together as a group to achieve these purposes" and if it fails to include "factual allegations regarding the continuity of structure or personnel of this group." *Moll v. U.S. Life Title Ins. Co.*, 654 F. Supp. 1012, 1032 (S.D.N.Y. 1987). The Second Amended Complaint is woefully devoid of any allegations tying MILA into the putative Waterfront Enterprise. There are no allegations describing how and when MILA joined together with the other members of the Waterfront Enterprise to carry out its purposes. There are no allegations that MILA as an entity functioned in any organized fashion with other members or even communicated with them. *See Guoba v. Sportsman Props., Inc.*, No. 03 cv 5039 (JS), 2006 WL 2792753, at *5 (E.D.N.Y. Sept. 26, 2006). There are no allegations that MILA was even aware of the other members' presence in the putative enterprise.

All that the Government alleges vis-à-vis MILA to substantiate MILA's membership in the Waterfront Enterprise is that "LCN-associate ILA officers are typically trustees on the boards of pension and welfare benefit funds . . . includ[ing] MILA . . . [and] [a]s fund trustees, these ILA officers greatly influence the management and operation of the funds, including the award of vendor contracts by the funds . . . [thus enabling] the ILA officers . . . to rig the award of fund vendor contracts to companies associated with LCN." *See* 2d Am. Compl. ¶ 77. These allegations, however, substantiate the membership in the Waterfront Enterprise not of MILA but of a few MILA trustees, only one of whom remains in office. *See* 2d Am. Compl. ¶ 20.

The purposes and activities of individual trustees that are contrary to their fiduciary obligations are not attributable to MILA. Under both federal labor law and federal pension law, there is an established rule against dual loyalties of trustees of employee benefit funds. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 330-34 (1981) (The language and legislative history of § 302(c)(5) and ERISA prohibits trustees from holding positions that create conflicts of interest with trust beneficiaries.); *see also Pegram v Herdrich*, 530 U.S. 211, 225 (2000). To the extent any MILA trustee joined the Waterfront Enterprise that enrollment was in violation of the trustee's fiduciary obligations to MILA's beneficiaries and thus contrary to the interests of MILA.

There is no allegation in the Second Amended Complaint that the enrollment of any trustee in the Waterfront Enterprise was known and approved by MILA's Board of Trustees. Indeed, the Second Amended Complaint concedes that the allegedly culpable trustees who joined the Waterfront Enterprise fraudulently concealed that association from their brethren on the MILA Board. *See* 2d Am. Compl. ¶¶ 194, 220. Absent knowledge and approval of the MILA Board, the act of a few MILA trustees (far fewer than a majority) in joining the Waterfront Enterprise does not become the act of MILA itself. *See Godlewska v. Human Dev. Ass'n*, No. 03 cv 3985 (DGT), 2005 WL 1667852, at *8 (E.D.N.Y. July 18, 2005) (*citing Local 857 I.B.T. Pension Fund v. Pollack*, 992 F. Supp. 545, 568 (S.D.N.Y. 1998)).

MILA And The MILA Board Should Be Dismissed With Prejudice.

MILA and the MILA Board have been dragged into this lawsuit as nominal defendants not because they are charged with any wrongdoing but because the Government seeks to have the Court appoint a monitor to oversee MILA's operations and to have MILA pick up the tab not only for its own monitor but also for monitors appointed to oversee other nominal defendants. *See* 2d Am. Compl. at 140-49 (Demand For Relief A(3)(c), B(6)(b), C(1)). MILA's participants and their dependents have the right to insist that before the Government can invade MILA's treasury to divert plan assets to pay the extraordinary expenses of court-appointed monitors, the Government must allege and prove with clarity that there is a valid basis for imposing this relief on MILA.

In order to reorganize or reform MILA through the appointment of a monitor under 18 U.S.C.A. § 1964(a) (West 2000), it must be alleged and shown that MILA alone or in association with other entities is a corrupted enterprise. The Government was unable to do so in *ILA-I*. The Government has not been able to do so in its Second Amended Complaint. The Government will never be able to do so in any future pleading.[6] The glaring reason for the Government's irremediable failure is the immutable fact that, as the Government itself admits, MILA has never shared in any nefarious purpose that would warrant its inclusion in any RICO enterprise. Yet MILA has been unjustifiably forced to suffer the indignity, stigma, and costly expense of being a defendant in this lawsuit for more than 2-1/2 years. The time has come for this Court to tell the Government, "Enough."

[6] Ordinarily leave to amend is not granted if the amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

CONCLUSION

For the foregoing reasons, the Second Amended Complaint should be dismissed with prejudice against MILA and the MILA Board.

Dated: New York, New York
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Respectfully submitted,

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